No. 79613-1

Court of Appeals No. 55902-8-I

SUPREME COURT OF THE STATE OF WASHINGTON

DONALD HARRY,

Respondent,

v.

BUSE TIMBER & SALES, INC., and DEPARTMENT OF LABOR AND INDUSTRIES FOR THE STATE OF WASHINGTON,

Petitioner,

BRIEF OF AMICUS CURIAE FOR WASHINGTON STATE LABOR COUNCIL, WASHINGTON STATE BUILDING & CONSTRUCTION TRADES COUNCIL, TEAMSTERS JOINT COUNCIL #28, AND THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO DISTRICT 751

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus include four organizations representing union workers in the State of Washington, covering a broad spectrum of trades and geographical locations.

The Washington State Labor Council, AFL-CIO, (WSLC) is the largest labor organization in Washington. The WSLC is a voluntary non-profit organization dedicated to protecting and strengthening the rights and conditions of working people and their families. The Washington State Building & Construction Trades Council, (WSBCTC) coordinates the efforts of local unions in the building trades, including contract negotiations with employer organizations and apprenticeship and training programs. Teamsters Joint Council #28 is the governing body for the Teamsters' Unions in Washington State. The Joint Council provides support and assistance to their local Unions throughout Washington. The International Association of Machinists and Aerospace Workers, AFL-CIO District 751, (IAM 751) represents active, retired and laid off hourly workers at The Boeing Company throughout Washington, as well as aluminum workers in Wenatchee, metal trades at Hanford, Ben Franklin Transit, regional disposal workers, workers at Grand Coulee Dam, mechanics,

machinists, welder fabricators, and repair, maintenance, and irrigation workers.

These organizations, individually and as a group, have an interest in the rights of workers, including those seeking benefits under Washington's Industrial Insurance Act, Title 51 RCW.

I. INTRODUCTION AND STATEMENT OF THE CASE

This appeal involves selecting the appropriate schedule of benefits applicable to occupational disease hearing loss permanent partial disability awards under our Industrial Insurance Act, Title 51 RCW. The underlying facts are set out in the Court of Appeals decision and the briefing of the parties. See Harry v. Buse Timber, 134 Wn. App. 739, 132 P.3d 1122, *review granted* _____ Wn.2d _____ (2007). See Buse Pet. for Rev. at 2-5; L&I Pet. for Rev. at 2-4; Harry Opp. to Pet. for Rev. at 2-4. For purposes of this amicus curiae brief the following facts are relevant.

Donald Harry (Harry) was exposed to injurious levels of noise during his 33 years of employment with Buse Timber & Sales (Buse). As part of a Hearing Conservation program, Buse regularly tested Harry for hearing loss by administering industrial audiograms. The industrial audiogram from 1974 documented a compensable hearing loss of 5.6% in the left ear. By 1986 Harry

had hearing loss in both ears. Subsequent audiograms documented progressively worsening hearing loss in both ears. With each audiogram Harry was told by his employer that his hearing "looked about the same". He was not told to consult a physician, nor was he advised to file a workers compensation claim. As the hearing loss was slow and incremental, Harry did not notice his hearing loss until the late 1990's. In 2001, after his retirement, Harry saw a physician who documented substantial noise-induced hearing loss in both ears, the result of prolonged exposure to harmful levels of noise at Buse. Harry filed a workers compensation claim.

Harry's claim was accepted by the Department of Labor & Industries (Department) and Buse, a self-insured employer, was ordered to pay a permanent partial impairment award to Harry for his hearing loss. The Department calculated benefits using the 2001 schedule of benefits for hearing loss impairment. Harry's award for his 38.13% binaural hearing loss was $25,673.19. Buse protested, arguing the 1974 schedule of benefits should apply as this was the date Harry's disease first became "partially disabling". The Department revised its award, and ordered the payment of the

permanent partial impairment award using the 1974 schedule of benefits. Harry's revised award was $5,490.72.

Harry appealed the Department's order, arguing the industrial audiograms were not valid to establish his disability, or in the alternative, that he should received a tiered award based on the schedule of benefits in effect at the time each audiogram documented an increase in permanent hearing loss. The Board of Industrial Insurance Appeals and the Superior Court affirmed the Department's decision. Both determined the applicable schedule of benefits for Harry's hearing loss was the 1974 schedule. Harry appealed to the Court of Appeals solely on the issue of whether he is entitled to a tiered award. The Court of Appeals reversed, finding "a tiered schedule of benefits was the only way to treat workers with noise-related hearing loss the same as workers with other occupational diseases and injuries as required by the Industrial Insurance Act". Harry 134 Wn. App. at 742.

Both Buse and the Department filed Petitions for Review with this Court challenging the application of multiple schedules of benefits in a single claim. See Buse Pet. for Rev. at 2; L&I Pet. for Rev. at 1-2. This Court granted review.

II. ISSUE PRESENTED

Should permanent impairment for occupationally related noise-induced hearing loss be paid based on the appropriate schedule of benefits in effect on the date an audiogram documents permanent partial impairment, without regard for whether a single claim or multiple claims have been filed?

III. SUMMARY OF ARGUMENT

A worker with an occupationally related noise induced hearing loss may file a claim under Title 51 on each occasion the condition meets the definition of an occupational disease. RCW 51.08.140. The same worker may delay filing a claim until he or she has received written notice of a covered condition from a medical provider, along with notification of the right to file a workers compensation claim. RCW 51.28.055. As similarly situated workers with comparable hearing loss, may have multiple claims or a single claim, the Industrial Insurance Act must be interpreted to provide comparable benefits to these workers.

There is no prohibition in the Industrial Insurance Act to recognizing multiple dates on which an occupational disease becomes partially disabling. In fact, 51.32.180(b) requires compensation rates for occupational disease claims be established

without regard for the date the disease was contracted or the date the claim was filed. Likewise, it should not matter whether a worker files multiple claims or a single claim. The focus must be on the date the disease required medical treatment or became totally or partially disabling.

Harry's occupational disease became partially disabling at the same moment there was medical evidence of a permanent partial disability. Each permanent partial impairment documented by successive audiograms should be compensated based on the schedule of benefits in effect at the time. To do so will ensure benefits are paid without regard to the date the claim or claims were filed.

A worker may receive compensation using multiple compensation rates simply by filing multiple successive claims. So long as each claim meets the definition of an occupational disease and is timely filed, the claims would be allowed by the Department. The worker could be entitled to multiple awards of permanent impairment using multiple compensation rates. In the interest of administrative economy, application of multiple schedules of benefits within a single claim would achieve the same outcome, with the filing of far fewer claims by each individual worker.

IV. ARGUMENT

A. RCW 51.32.180(b) which requires establishing the rate of compensation for occupational diseases without regard to the date of filing of the claim, does not preclude the use of more than one schedule of benefits.

In 1988 the Washington Legislature provided guidance as to how workers who suffer a disability from an occupational disease should be compensated.

> Every worker who suffers disability from an occupational disease in the course of employment under the mandatory or elective adoption provisions of this title, or his or her family and dependents in case of death of the worker from such disease or infection, shall receive the same compensation benefits and medical, surgical and hospital care and treatment as would be paid and provided for a worker injured or killed in employment under this title, except as follows: (a) This section and RCW 51.16.040 shall not apply where the last exposure to the hazards of the disease or infection occurred prior to January 1, 1937; and (b) for claims filed on or after July 1, 1988, the rate of compensation for occupational diseases shall be established as of the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first, and without regard to the date of the contraction of the disease or the date of filing the claim. RCW 51.32.180

First and foremost, workers with an occupational disease shall receive the same compensation and medical benefits as workers with industrial injuries. The limited exception provided in 51.32.180(b) speaks to establishing a schedule of benefits, which

must be done in all claims, whether injury or occupational disease. It is not an exception to providing like benefits to similarly situated workers.

Nothing in RCW 51.32.180 *prevents* successive awards as contemplated by the Court of Appeals in Harry. RCW 51.32.180(b) is ambiguous as it does not provide guidance on whether a claim may be said to have multiple dates on which it became partially disabling. No direction is provided in the statute to address the situation where the facts would support the filing of multiple separate claims, but the time limit for filing a claim permits the delay in claim filing for years, resulting in only a single claim. See RCW 51.08.140 defining occupational disease and 51.28.055 providing the time limitation within which an occupational disease claim must be filed.

Where statutory language is open to more than one interpretation it is ambiguous. It must therefore be read in relation to all provisions, to give effect to the Industrial Insurance Act as a whole. Weyerhaeuser Co. v. Tri, 117 Wn.2d 128, 133 814 P.2d 629 (1991). This Court must give meaning to all portions of the statute, including the definition of an occupational disease, the time limit for filing an occupational disease hearing loss claim, and the

method for establishing rates of compensation within an occupational disease claim.

51.32.180(b) does include plain language which indicates the rate of compensation shall be established "without regard" for the date of the filing of the claim. This language should be interpreted to mean "without regard" to the date of filing of the claim or claims. In other words, the rate of compensation shall be set without regard for whether the worker filed a single claim or multiple successive claims. If no regard is given to the date a claim is filed, it should make no difference in the analysis whether a worker files a single claim or multiple successive claims.

RCW 51.16.040 supports this interpretation. That statute requires compensation and benefits for occupational diseases be provided in the same manner as for industrial injuries. Where a worker suffers more than one distinct industrial injury, each gives rise to a separate claim, and a separate schedule of benefits. This is true even where the multiple injuries are to the same body part. [1] Likewise, for occupational disease claims where facts support more

[1] Regulations guide the Department in paying benefits where there is a substantial question whether benefits should be paid pursuant to the reopening of an accepted claim or allowed as a new claim for a new injury or occupational disease. WAC 296-14-420.

than one proximally event, separate compensation rates must be established. [2]

The nature of hearing loss, as opposed to most other occupational diseases, supports the conclusion that hearing loss can emanate from two or more causally independent proximate events. With noise induced hearing loss, once the noise exposure stops, progression of the disease also stops. [3] Without additional injurious exposure, the worker will suffer no additional disability, partially disabling or otherwise. Any additional exposure is a separate proximal incident. Only with this additional injury, will there be an additional partially disabling condition.

It is this characteristic of noise induced hearing loss which supports the possibility of multiple claims for a single worker's hearing loss. The on-going exposure to injurious occupational noise falls within the definition of a separate and distinct occupational disease. Where the facts support multiple successive claims,

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[2] In Kilpatrick v. Department of Labor & Industries, 125 Wn.2d 231, 883 P.2d 1370 (1994) the Court had no conceptual difficulty with the notion there may well be multiple schedules of benefits for "pathologically distinct" diseases, despite the existence of only one claim.

[3] "Once noise exposure stops, so does the progression of the hearing loss, unless other factors are involved. Damage to hearing is permanent: Once the hair cells in the cochlea are destroyed, the cells cannot be rejuvenated. Thus, once the damage is done, one's hearing can get neither better nor worse because of noise exposure." Blackburn v. Workers' Comp. Div., 212 W.Va 838, 575 S.E.2d 597 (2002)

51.32.180(b) would necessarily permit the use of multiple successive compensation schedules where a single claim is filed.

Workers with identical patterns of noise induced hearing loss should not be compensated differently depending on whether they file a single timely claim or multiple timely claims. Both Buse and the Department acknowledge if Harry had filed more than one claim for his hearing loss, there would be more than one schedule of benefits used to calculate his compensation. Both have no difficulty applying multiple schedules where there are multiple claims. This is exactly the circumstance in Pollard v. Weyerhaeuser Co., 123 Wn. App. 506, 98 P.3d 545 (2004). There the Court specifically held noise related hearing loss which was not causally related to earlier noise-related hearing loss is a separate and distinct occupational disease. Each distinct occupational disease will become partially disabling on a separate date. Since 51.32.180(b) specifically instructs the Department to disregard the date of claim filing, it must not matter whether a claim for hearing loss was filed in 1974 or whether multiple claims were filed in 1974, 1984 and 1994. Our Industrial Insurance Act mandates that benefits be provided in a fair and uniform manner. Workers in like circumstance should receive

like benefits. The injured workers in Pollard and Harry should have similar outcomes.

B. Where the "partially" disabling condition is a permanent partial disability, the worker is entitled to an award based on the compensation schedule then in effect, regardless of subsequent injury and impairment.

Because occupational disease claims do not arise from a sudden and tangible event, the rate of compensation must be tied to something other than a date of injury. The legislature chooses the date the disease requires medical treatment, or becomes totally or partially disabling. RCW 51.32.180(b). As Harry did not seek medical attention until after his retirement in 2001, the focus here is on when Harry's hearing loss become totally or partially disabling.

There are four discreet categories to be considered when determining whether a condition is totally or partially disabling. A "totally" disabling condition may be described as either temporary or permanent. Likewise, a "partially" disabling condition is also temporary or permanent. The reference in RCW 51.32.180(b) to an occupational disease being "totally" or "partially" disabling must refer to one of these four categories.

A "totally" disabling condition is either temporary or permanent. A temporary total disability is a condition which

temporarily incapacitates a worker from performing work at any gainful employment. It differs from permanent total disability only in the duration of the disability. Hubbard v. Department of Labor & Industries, 140 Wn.2d 35, 992 P.2d 1002 (2000). All parties in the current matter agree Harry's hearing loss has never been an impediment to his ability to work. In fact, Harry was able to adequately perform his job duties with Buse up to the date of his retirement. Thus, Harry's occupational disease has never been "totally" disabling within the meaning of Title 51 and specifically the language of 51.32.180(b).

A "partially" disabling condition is again either temporary or permanent. A temporary partial disability exists when a worker's earning power has been partially restored, and the disability is not yet considered permanent. Such a worker may be entitled to loss of earning power benefits under 51.32.090. As Harry's hearing loss never interfered with his ability to work, his condition was never a temporarily partially disabling condition.

The only remaining disability category is permanent partial disability. A worker's industrially related condition is permanent when it becomes fixed, that is, stabilized to the degree that no further medical treatment is contemplated. Pybus Steel Co. v.

Department of Labor & Industries, 12 Wn. App. 436, 530 P.2d 350 (1975). "Fixed and stable" is also referred to as the point at which the worker's condition reaches maximum medical improvement. Hearing loss due to occupational noise exposure is unique in that it is rarely "totally" disabling. The evidence of a "partially" disabling hearing loss most often coincides with evidence of a permanent partial impairment. That is, a condition which is not in need of medical treatment, and is fixed and stable. In the instant case, Harry's occupational disease can only be characterized as partially *and permanently* disabling. Harry only triggers the "partially disabling" language in RCW 51.32.180(b) because there is objective medical evidence of a permanent partial disability. As each audiogram documents a partially disabling, permanent, functional loss, an entitlement to an award is established.

Harry's partially disabling hearing loss was first documented in the 1974 audiogram, and was limited to a loss of hearing in his left ear. At that moment, his condition was fixed and stable, had reached maximum medical improvement and was partially disabling. No further deterioration in his condition would occur absent additional injury. Harry is entitled to a permanent partial disability award for the hearing loss in his left ear, using the

schedule of benefits in effect at the time of that audiogram. If a claim had been filed in 1974 it would have been allowed, and closed with the appropriate impairment award, based on the schedule of benefits then in effect. Harry is entitled to this award regardless of any subsequent injury or impairment.

Each subsequent audiogram documents a *new* partially disabling occupational disease. The continued exposure to harmful levels of occupational noise is a new proximate cause event. Harry suffered a pathologically distinct and partially disabling condition, that is, an increase in his permanent hearing loss. This is most evident when we look at the hearing loss pattern in Harry's left ear compared to the right ear. Harry's hearing loss in 1974 was limited to the left ear. Hearing loss in the right ear could not possibly be totally or partially disabling in 1974, as none existed on the 1974 audiogram. Binaural Hearing loss was not documented until some years later. The Appellant's argument would establish the schedule of benefits for binaural hearing loss a decade before this hearing loss was either partially or totally disabling. Regardless of whether the permanent partially disabling condition is the progression of hearing loss from one ear to both, or an increase in overall hearing loss from one audiogram to the next, Harry is entitled to an award

based on the schedule of benefits in effect on the date each successive audiogram documents a new and separate permanent partial disability.

The sequence or timing of claim filing should not deprive the worker of their right to benefits. This principal was articulated and applied by the Court in McIndoe v. Dept of Labor & Industries, 144 Wn.2d 252, 26 P.3d 903 (2001) There the Court was asked to determine whether an award for permanent partial impairment for hearing loss could follow an award for permanent total disability, or pension award. The Court held where the hearing loss was sustained before the unrelated injuries which resulted in the pension award, and the claim was filed within the statute of limitations, such an award was proper. It did not matter whether the worker's hearing loss claim was open, pending, or even filed at the time of the pension award. Relying on the principal that the provisions of Title 51 be liberally construed in favor of the worker, it was held the worker should not be penalized for the sequencing of the filing of the claims.

Likewise, Harry should not be penalized for the timing in filing his claim. If the record supports an award of permanent impairment on a date certain, he should be compensated using the

schedules then in effect. It should not matter when he filed the claim, or claims, so long as within the statute of limitations.

C. As a worker could file multiple claims for each successive documented increase in hearing loss, administrative economy supports using multiply schedules of benefits within a single claim.

Both Buse and the Department acknowledge Harry could have filed a new separate hearing loss claim each year when he underwent the industrial audiograms required by his employer's Hearing Conservation program. See Buse Pet. for Rev. at 7-9, L&I Pet. for Rev. at 12. So long as Harry could demonstrate injurious exposure, within the definition of an occupational disease, a new claim could have been filed and allowed by the Department. Each claim may have supported an award of permanent partial impairment for any additional hearing loss documented by the most recent audiogram. The Department would have established the date the condition became partially disabling, based on the recent audiogram, and provided benefits using the schedule of benefits in effect on that date.

Administrative economy would dictate the Department calculate compensation using multiple schedules within a single claim, rather than requiring the worker to file a separate claim each

time an industrial audiogram is conducted. Amicus represents Union workers in diverse trades and geographic locations throughout Washington. If the Court of Appeals decision here is reversed, the only responsible advice to workers in this state will be to file a new, separate and distinct claim for each industrial audiogram as it is performed. In this way, each worker will be treated as the worker in Pollard. The schedule of benefits in effect on the date of each audiogram will be used to calculate any permanent partial disability which is due and owing. Instead of one claim for occupationally related hearing loss, the Department will be faced with multiple claims for each worker. Employers who conduct yearly industrial audiograms as part of a Hearing Conservation program may well see yearly claims for each worker tested. The result would be a tremendous increase in workload to process allowance, identify chargeable employer, process medical bills, assess audiograms for validity and extent of hearing loss and to provide an impairment award under multiple claims for a single worker. The outcome for the worker will be the same as that intended by the Court of Appeals in Harry.

This result would be an enormous waste of resources within the Department. That Buse and the Department would advocate

this cumbersome process reflects the weakness in their position. It is not that a worker such as Harry *cannot* be compensated using multiple schedules of benefits, tied to permanent impairment documented in successive audiograms, it is that the appellants wish to push workers through a series of administrative hoops and secret handshakes before doing so. Such an argument puts form over substance. The argument is advanced more to deny this particular injured worker his due, rather than to establish a workable process for all workers similarly situated, or to provide guidance to the Department in subsequent claims adjudication.

There is an additional policy consideration when determining whether a worker should be required to file multiple hearing loss claims to obtain the outcome envisioned by the Court of Appeals in Harry. Workers are historically reluctant to file workers compensation claims against their current employer. This loyalty to a current employer is particularly strong where the worker's condition does not prevent employment, and is not in need of medical treatment. Unless the time for filing a claim is running, there is no sense of urgency or need to file a claim. Further, despite efforts to limit discrimination and retaliation by employers, workers remain hesitant to make a claim against an existing

employer. See RCW 51.48.025. Whether out of loyalty or fear of discrimination, retaliation or recrimination, it is common for workers to ignore their gradually increasing hearing loss until after they leave the workforce. Many occupational hearing loss claims are not filed until after the worker retires. This may be due to an increase in the workers perception of hearing loss after being removed from the noisy environment. However, it can just as easily be explained by the worker's aversion to filing a claim against an employer while still working for that employer.

This natural inclination to delay claim filing should neither be penalized nor rewarded. The employer should not be permitted to limit compensation by tying an impairment award for all hearing loss to a ridiculously early industrial audiogram. The worker should not be able to inflate benefits by claiming entitlement to the schedule of benefits in effect on the date of claim filing. Use of a tiered approach advocated by Harry is the middle ground required by the Industrial Insurance Act's mandate to provide sure and certain relief to workers injured in the course of their employment, and to liberally construe the Act for the purposes of minimizing the suffering and economic loss arising from those injuries. RCW 51.12.010, 51.04.010.

V. CONCLUSION

The Court should affirm the Court of Appeals and resolve this appeal accordingly.

DATED this 19th day of December, 2007.

WELCH & CONDON

TERRI L. HERRING-RUZ
WSBA #17782

Original signed and retained by counsel.

APPENDIX

Attachment A

RCW 51.08.140

"Occupational disease."

"Occupational disease" means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title.

[1961 c 23 § 51.08.140. Prior: 1959 c 308 § 4; 1957 c 70 § 16; prior: 1951 c 236 § 1; 1941 c 235 § 1, part; 1939 c 135 § 1, part; 1937 c 212 § 1, part; Rem. Supp. 1941 § 7679-1, part.]

Attachment B

RCW 51.28.055

Time limitation for filing claim for occupational disease — Notice — Hearing loss claims — Rules.

(1) Except as provided in subsection (2) of this section for claims filed for occupational hearing loss, claims for occupational disease or infection to be valid and compensable must be filed within two years following the date the worker had written notice from a physician or a licensed advanced registered nurse practitioner: (a) Of the existence of his or her occupational disease, and (b) that a claim for disability benefits may be filed. The notice shall also contain a statement that the worker has two years from the date of the notice to file a claim. The physician or licensed advanced registered nurse practitioner shall file the notice with the department. The department shall send a copy to the worker and to the self-insurer if the worker's employer is self-insured. However, a claim is valid if it is filed within two years from the date of death of the worker suffering from an occupational disease.

(2)(a) Except as provided in (b) of this subsection, to be valid and compensable, claims for hearing loss due to occupational noise exposure must be filed within two years of the date of the worker's last injurious exposure to occupational noise in employment covered under this title or within one year of September 10, 2003, whichever is later.

(b) A claim for hearing loss due to occupational noise exposure that is not timely filed under (a) of this subsection can only be allowed for medical aid benefits under chapter 51.36 RCW.

(3) The department may adopt rules to implement this section.

[2004 c 65 § 7; 2003 2nd sp.s. c 2 § 1; 1984 c 159 § 2; 1977 ex.s. c 350 § 34; 1961 c 23 § 51.28.055. Prior: 1959 c 308 § 18; prior: 1957 c 70 § 16, part; 1951 c 236 § 1, part.]

Notes:

Report to legislature -- Effective date -- Severability -- 2004 c 65: **See notes following RCW 51.04.030**

Attachment C

RCW 51.48.025

Retaliation by employer prohibited — Investigation — Remedies.

(1) No employer may discharge or in any manner discriminate against any employee because such employee has filed or communicated to the employer an intent to file a claim for compensation or exercises any rights provided under this title. However, nothing in this section prevents an employer from taking any action against a worker for other reasons including, but not limited to, the worker's failure to observe health or safety standards adopted by the employer, or the frequency or nature of the worker's job-related accidents.

(2) Any employee who believes that he or she has been discharged or otherwise discriminated against by an employer in violation of this section may file a complaint with the director alleging discrimination within ninety days of the date of the alleged violation. Upon receipt of such complaint, the director shall cause an investigation to be made as the director deems appropriate. Within ninety days of the receipt of a complaint filed under this section, the director shall notify the complainant of his or her determination. If upon such investigation, it is determined that this section has been violated, the director shall bring an action in the superior court of the county in which the violation is alleged to have occurred.

(3) If the director determines that this section has not been violated, the employee may institute the action on his or her own behalf.

(4) In any action brought under this section, the superior court shall have jurisdiction, for cause shown, to restrain violations of subsection (1) of this section and to order all appropriate relief including rehiring or reinstatement of the employee with back pay.

Attachment D

WAC 296-14-420

Payment of benefits — Aggravation reopening/new injury.

(1) Whenever an application for benefits is filed where there is a substantial question whether benefits shall be paid pursuant to the reopening of an accepted claim or allowed as a claim for a new injury or occupational disease, the department shall make a determination in a single order. Where one of the claims is with a self-insured employer and another is with a state fund employer, such determination shall be made jointly by the program managers for claims administration and self insurance, or their respective designees.

(2) Pending entry of the order, benefits shall be paid promptly by the entity which would be responsible if the claim were determined to be a new injury or occupational disease.

(3) The department is required to act under this rule only if:

(a) There is substantial evidence that the worker will be determined to be entitled to benefits on one of the claims; and

(b) There is uncertainty regarding which of the entities is responsible.

(4) Time-loss compensation shall be paid at the lesser of the two entitlements that may apply to the claim until responsibility has been determined between state fund and self-insured employer, two self-insured employers, or two state fund employers.

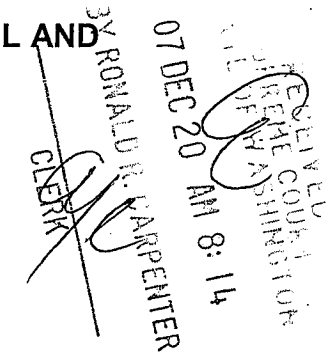
(5) If, upon final determination of the responsible insurer, the entity that paid benefits under subsection (2) of this section is determined not to be responsible for payment of benefits, such entity shall be reimbursed by the responsible entity for all amounts paid.

[Statutory Authority: Chapters 51.04, 51.08, 51.12, 51.24 and 51.32 RCW and 117 Wn.2d 122 and 121 Wn.2d 304. 93-23-060, § 296-14-420, filed 11/15/93, effective 1/1/94. Statutory Authority: RCW 51.32.110 and 51.32.190(6). 90-19-028, § 296-14-420, filed 9/12/90, effective 10/13/90.]

CERTIFICATE OF MAILING

CLAIMANT: Donald Harry
NO: 79613-1

ORIGINAL BRIEF OF AMICUS CURIAE SENT VIA MAIL AND FILED VIA EMAIL TO:



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I certify that either the original, via personal delivery, or a copy of the document attached hereto was mailed, postage prepaid, first class mail to the parties referenced above this 19th day of December, 2007.

Marlene Peters